IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY PILKINGTON,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CGU INSURANCE CO., INC.	:	**NO. 00-2495**

M E M O R A N D U M

Waldman, J. **February 9, 2000**

Plaintiff was terminated from his employment with defendant after he was accused of sexually harassing a subordinate female employee. He has asserted claims for violations of Title VII and ERISA and for defamation, intentional infliction of emotional distress, breach of contract and wrongful discharge.

The pertinent facts as alleged in the complaint are as follow.

Plaintiff was employed by defendant for seventeen and a half years, during which he was twice promoted. His last promotion was to the position of Repository Manager, which he held at the time of his termination.

On March 26, 1998, defendant initiated a bonus incentive program entitled “Information Systems Staff Retention Program” (the “retention program”). The stated purpose of the retention program was to “encourage . . . information systems associates to remain with the company” through a transition period and into the new millennium. Eligible employees,

including plaintiff, would accrue as a bonus a certain percentage of their salary during four quarterly “incentive periods” over a two year time span from March 30, 1998 through March 26, 2000. As a further incentive for employees to remain, payment of the bonuses was structured so that employees would receive one third of their accrued bonus at the end of each incentive period (“immediate money”) and two thirds for each period at the expiration of the overall program on March 26, 2000 (“end of program money”). Employees were eligible to receive immediate money if they were employed by defendant up to and including the last day of the respective incentive period. Employees were eligible to receive “end of program money” if they were employed by the defendant through the entirety of the final incentive period, ending March 26, 2000.

The retention program statement provided that employees who left defendant’s employ “due to no fault of their own such as reduction in work force, relocation of work assignment, etc. will become immediately eligible for the payment of any credited moneys.” It further states that employees who are “terminated for cause immediately cease participation in the program and lose any accredited money and accrued interest.”

At the time plaintiff was promoted to Repository Manager, he developed a workplace relationship with Janine O'Brien, a female Data Analyst. The two corresponded

periodically through e-mail both at work and at home about company business and “friendly” private matters. Plaintiff became Ms. O'Brien's supervisor in September 1999. Shortly thereafter, she went on short-term disability leave. During this period, plaintiff telephoned or e-mailed Ms. O'Brien “1-2 times bi-weekly to see how she was doing.” Ms. O'Brien frequently confided in plaintiff regarding private matters in her life during these conversations.

During such a telephone conversation on September 18, 1999, plaintiff said to Ms. O'Brien “I love ya” and “I am looking forward to you coming back.” Shortly thereafter, Ms. O'Brien reported this conversation to defendant and claimed that plaintiff was sexually harassing her. On October 6, 1999, plaintiff spoke with his supervisor, Patricia Virgilli, about this conversation with Ms. O'Brien. Plaintiff confirmed Ms. O'Brien's account of the substance of the conversation but emphasized that he told her “I love ya” in a friendly, innocent manner. Plaintiff also recounted incidents of “friendly” behavior by Ms. O'Brien towards him and suggested that if defendant were investigating his conduct, it should likewise investigate her conduct.

On November 1, 1999, Ms. Virgilli notified plaintiff that he was being terminated for violating the company's policy against sexual harassment. Defendant conducted no “meaningful

investigation" of the charge against him and failed to investigate Ms. O'Brien's conduct. To the best of plaintiff's knowledge, defendant has failed to investigate charges of sexual harassment "or related misconduct" against female employees.

Defendant asserts that plaintiff has failed to state any claim upon which relief can be granted and has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding such a motion, the court must accept as true the factual allegations in the complaint and reasonable inferences therefrom, and view them in a light most favorable to the nonmovant. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal of a claim is appropriate when it clearly appears from the face of the complaint that the plaintiff can prove no set of facts which would entitle him to relief. See Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).[1] A claim may be dismissed when the facts alleged and reasonable inferences

[1]In considering a motion to dismiss, the court may also consider any document of undisputed authenticity appended to the complaint or upon which the complaint explicitly relies. See Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1220 (3d Cir. 1996); Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). The court will thus consider the "Information Systems Staff Retention Program Outline" appended to the complaint.

therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988).

The essence of plaintiff's Title VII claim is that defendant treated him differently than its female employees in its manner of investigating and responding to sexual harassment charges, which effectively resulted in his termination because of gender.

To make out a prima facie case of sex discrimination due to disparate treatment, a plaintiff must show that he is a member of a protected class; that he was qualified for his position; that he was discharged; and, that others similarly situated who were not members of his class were treated more favorably. See Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 561 (7th Cir. 1998) ("reverse" sexual discrimination claim). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (racial discrimination claim); Weldon v. Kraft, Inc., 896 F.2d 793, 797 (3d Cir. 1990) (same).

Employers have an affirmative duty to remedy sexually hostile and abusive conduct. See Kolstad v, American Dental Ass'n, 527 U.S. 526, 545 (1999); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, (1998); Anthony v. County of Sacramento, 898 F. Supp. 1435, 1450 (E.D. Cal. 1995). Courts have at least implied, however, that a male who succeeds in

demonstrating that his employer handles harassment claims differently based upon gender could maintain a discriminatory discharge claim based on disparate treatment. See Morrow, 152 F.3d at 561 n.2 ("There is no doubt that selective enforcement of company policies against one gender and not the other would constitute sex discrimination under Title VII"); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994) (indicating that plaintiff in "reverse" discrimination case may use McDonnell Douglass test to assert prima facie disparate treatment claim); Balazs v. Liebenthal, 32 F.3d 151, 155 (4th Cir. 1994) (rejecting plaintiff's discriminatory discharge claim in part because he failed to allege "he was treated differently from any other employee, male or female, because of his sex").

Insofar as plaintiff has alleged discrimination based upon his gender, he falls within a protected class. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (Title VII protects men as well as women); Tomkins v. Public Serv. Elec. & Gas, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (same). He alleges that he was qualified for his position and that he was terminated. Plaintiff alleges that defendant treated harassment claims against females differently and, at least by implication, that he would not have been terminated had he not been a male. He does not explicitly allege that these unspecified females were similarly situated to him - e.g. whether they stood accused by a

subordinate employee. Nevertheless, the court cannot conscientiously conclude that plaintiff can prove no set of facts to support his Title VII disparate treatment claim.

The essence of plaintiff's ERISA claim is that defendant used the sexual harassment charge as a pretext for terminating him to avoid paying the bonus money he had accrued under the retention program. An employer may not discharge or discriminate against an employee for the purpose of interfering with his attainment of a right to which he may become entitled under an ERISA benefit plan. See 29 U.S.C. § 1140; Gavalik v. Continental Can. Co., 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 979 (1987).

Plaintiff maintains that the retention program constitutes an "employee pension benefit plan" under ERISA. ERISA defines an employee pension benefit plan as any program established by an employer that:

> (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to termination of covered employment or beyond.

29 U.S.C. § 1002(2)(A). The Department of Labor has construed ERISA's provisions to specifically exempt bonus payments to employees "unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees." 29 C.F.R. § 2510.3-2(c).

Plaintiff argues that the period of "covered employment" should be construed as the duration of the retention program, placing the program within ERISA's coverage since two thirds of the bonus payments were deferred until the program's completion. Courts construing ERISA and its regulations have found otherwise. See Albers v. Guardian Life Ins. Co., 1999 WL 228367, *4 (S.D.N.Y. April 19, 1999) (natural reading of requirement that bonus payments be deferred until termination of covered employment "'is that the statute requires that a plan generally defer the receipt of income to the termination of employment'") (quoting Hagel v. United Land Co., 759 F. Supp. 1199, 1202 (E.D. Va. 1991)). See also McKinsey v. Sentry Ins., 986 F.2d 401, 406 (10th Cir. 1993) (bonus plan that did not systematically defer payments until retirement not within Act's coverage); Killian v. McCullogh, 850 F. Supp. 1239, 1246 (E.D. Pa. 1994) (same). The retention program at issue in this case provides for payment to occur within a discrete time period and in no way contemplates systematically deferring payments until retirement. Plaintiff has not set forth a cognizable claim under ERISA.

Plaintiff claims that the circumstances surrounding his termination by defendant are sufficiently outrageous to support a claim for intentional infliction of emotional distress. The essence of plaintiff's defamation claim is that defendant falsely

accused him of sexual harassment with knowledge that he would have to disclose the ground for his termination to prospective employers and that defendant disclosed to unidentified third parties that plaintiff had been terminated "for cause."

Defendant asserts that both claims are barred by the exclusivity provision of the Pennsylvania Worker's Compensation Act. The WCA does bar plaintiff's claim for intentional infliction of emotional distress. See Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997); Doe v. William Shapiro, Esq., P.C., 852 F. Supp. 1246, 1254 (E.D. Pa. 1994); Poyser v. Newman & Co., 522 A.2d 548, 551 (Pa. 1987). The Act does not, however, bar plaintiff's defamation claim. See Urban v. Dollar Bank, 725 A.2d 815, 819 (Pa. Super. Ct. 1999) (defamation claim against employer not barred by exclusivity provision since Act not intended to redress injury to reputation). In any event, plaintiff has failed to set forth substantively cognizable claims for defamation or intentional infliction of emotional distress.

To state a claim for intentional infliction of emotional distress, a plaintiff must allege intentional or reckless conduct by a defendant which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy v. Avegelone, 720 A.2d

745, 754 (Pa. 1998). See also Rowe v. Marder, 750 F. Supp. 718, 726 (W.D. Pa. 1990) (noting cause of action limited to acts of extreme "abomination"), aff'd, 935 F.2d 1282 (3d Cir. 1991). The conduct alleged by plaintiff does not remotely satisfy this test. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (sexual harassment insufficient); Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989) (setting aside verdict for plaintiff who was defamed and falsely referred for prosecution); Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (ill-motivated callous termination of employment sufficient); Motheral v. Burkhart, 583 a.2d 1180, 1190 (Pa. Super. 1990) (falsely accusing plaintiff of child molestation insufficient).

To sustain a claim for defamation under Pennsylvania law, a plaintiff must show the defamatory character of the communication; its publication by the defendant; its application to the plaintiff; the understanding of the recipient of its defamatory meaning; the understanding of the recipient that it was intended to apply to the plaintiff; special harm to the plaintiff from its publication; and, abuse of any conditionally privileged occasion. See Pa. C.S.A. § 8343(a). To recover damages, a plaintiff must also prove that the statement results from some fault on the part of the defendant. See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d

914, 923 (3d Cir.), cert. denied, 498 U.S. 816 (1990).

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 187 (3d Cir. 1999) (quotations omitted). An allegedly defamatory statement must also be viewed in context to assess the effect it is fairly calculated to produce and the impression it would ordinarily create with those among whom it is intended to circulate. See Weinstein v. Bullick, 827 F. Supp. 1193, 1197 (E.D. Pa. 1993).

A statement that someone has been terminated from employment or terminated for cause, without more, is not defamatory. See Livingston v. Murray, 612 A.2d 443, 448 (Pa. Super. 1992); Carney v. Memorial Hospital, 477 N.Y.S.2d 735, 736-37 (N.Y. App. Div. 1984). As the plethora of labor-management and unemployment compensation cases illustrate, in the employment context the term "for cause" encompasses an array of matters which would not subject one to public contempt or repel others, e.g., excessive absence, sloppy paperwork, disregard of safety rules, damage to or loss of company property, insubordination, use of a company computer for personal purposes, unauthorized use of a company vehicle, fighting with a co-worker. See Terry v. Hubbell, 167 A.2d 919, 923 (Conn. Super. 1960) ("natural and

ordinary meaning [of] the words 'discharged for cause' mean no more than that the plaintiff was released or dismissed from an office or employment for some undisclosed circumstance"). Many persons have been terminated "for cause" without losing esteem in their community or the association of others.

In any event, even assuming the alleged statement is capable of defamatory meaning, there is no showing of publication.

To state a claim, a plaintiff must identify specific individuals to whom a defamatory statement was published. See Rembert v. Allstate Ins. Co., 2000 WL 1717245, *1 (E.D. Pa. Nov. 15, 2000); Miketic v. Brown, 675 A.2d 324, 331 (Pa. Super. 1996); Jaindl v. Moore, 637 A.2d 1353, 1358 (Pa. Super. 1994); Raneri v. DePolo, 441 A.2d 1373, 1375 (Pa. Cmwlth. 1982) (defamation claim "defective" where plaintiff alleged publication to "third persons" for "fail[ure] to allege with particularity the identity of persons to whom the statements were made").[2] Plaintiff's allegation that defendant published the statement to unspecified third parties does not satisfy the requirements of Pennsylvania law.

[2]Without identifying a recipient of the statement, of course, a plaintiff could find it difficult to show that the recipient understood the statement's defamatory meaning and that it was intended to apply to plaintiff.

Plaintiff's allegation that he will be compelled to disclose the reason for his termination to prospective employers is also unavailing. That an employee may foreseeably be required to relate to prospective employers or others a defamatory statement made to him by his employer in communicating the reasons for his termination does not constitute actionable publication. See Jones v. Johnson & Johnson, 1997 WL 549995, *9 (E.D. Pa. Aug. 22, 1997) (defamatory remarks made by employer in connection with termination are absolutely privileged), aff'd, 166 F.3d 1205 (3d Cir. 1998); Lynch v. Borough of Ambler, 1996 WL 283643, *7 (E.D. Pa. May 29, 1996) (same); Strange v. Nationwide Mut. Inc. Co., 867 F. Supp. 1209, 1221-22 (E.D. Pa. 1994) (Pennsylvania does not recognize claim for compelled self-publication of reason stated to employee for termination); Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1025 (Pa. Super.) (employer has absolute privilege for statements made to terminated employee regarding reasons for termination), app. denied, 600 A.2d 539 (Pa. 1991).

Plaintiff also asserts a claim for wrongful discharge.[3] In Pennsylvania an employer may terminate an at-will employee at any time for any reason whatsoever except where a discharge

[3]Plaintiff characterizes this claim as one for a violation of "public policy." The court assumes that plaintiff intended to assert a claim for wrongful discharge as neither Pennsylvania nor any other jurisdiction of which the court is aware recognizes a private cause of action for a violation of public policy per se.

violates clearly mandated public policy. See Borse v. Piece Goods Shop, 963 F.2d 611, 617 (3d Cir. 1992); Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1341, 1343-44 (3d Cir. 1990). The sum and substance of plaintiff's "Public Policy" claim is that "defendant violated the public policy of the Commonwealth of Pennsylvania by knowingly misusing sexual harassment laws to find a fraudulent reason to terminate plaintiff's employment and to escape its contractual obligations in the bonus incentive contract."

The public policy exception has been "interpreted narrowly." Id. at 1343. A clearly mandated public policy necessarily must implicate more than private interests in a particular case. A discharge violates public policy when it thwarts the administration of a Commonwealth agency or statutory mechanism, or undermines a statutory obligation of the employer or the employee. See McLaughlin Gastrointestinal Specialists, Inc., 750 A.2d 382, 388 (Pa. 2000). It is applied where an employee has been required to commit a crime, prevented from complying with a statutory duty or discharged in violation of a specific statutory prohibition. See Spierling v. First American, 737 A.2d 1250, 1252, 1254 (Pa. Super. 1999) (termination of plaintiff for reporting Medicare fraud did not violate public policy as she had no statutory duty to do so, employer had not asked her to commit crime and there was no specific statutory

prohibition against her discharge.)

A pretextual termination to avoid a contractual obligation to pay a bonus, at least in the circumstances alleged, does not remotely constitute the type of conduct to which the narrow public policy exception has been held to apply. While plaintiff does not explicitly predicate his wrongful discharge claim on gender discrimination, the court also notes that a claim for wrongful discharge may be maintained only in the absence of any statutory remedy. See Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983); Hicks v. Arthur, 843 F. Supp. 949, 957 (E.D. Pa. 1994); Clay v. Advanced Computer Applications, 559 A.2d 917, 918-19, 921 (Pa. 1989). The Pennsylvania Human Relations Act provides a remedy for employment discrimination.

Plaintiff's breach of contract claim is predicated on the denial of the accrued bonus monies. Defendant asserts that as an at-will employee who could be fired for any reason at any time, plaintiff cannot maintain a breach of contract claim.

In the absence of evidence to the contrary, employment relationships in Pennsylvania are presumed to be at-will. See McLaughlin, 750 A.2d at 287. An employer, however, can create a unilateral contract by offering additional terms of employment conditioned upon the employee's continued performance of his job. See Kemmerer v. ICI Americas Inc., 70 F.3d 281, 287 (3d Cir. 1995) (deferred compensation plan created a unilateral contract

which could be accepted by employee's continued employ with company). See also Bauer v. Pottsville Area Emergency Med. Servs., 758 A.2d 1265, 1269 (Pa. Super. 2000). In Bauer, the defendant's employee handbook emphasized that employment was at-will, but also set forth conditions under which an employee could attain certain enumerated benefits. The Court concluded that an employer's communication to employees of certain rights may constitute an offer of a contract with those terms which the employee may accept by continuing to perform the duties of his job without a need for additional or special consideration.

While this may be characterized as a modification of the at-will employment relationship, it is more realistically viewed as a contract incidental or collateral to at-will employment. An employer who offers various rewards to employees who achieve a particular result or work a certain amount of overtime, for example, may be obligated to provide those awards to qualifying employees, although retaining the right to terminate them for any or no reason. See Donahue v. Federal Exp. Corp., 753 A.2d 238, 242 (Pa. Super. 2000) (discussing case of discharged at-will employee who had no cognizable wrongful discharge claim but allowed to sue for breach of profit sharing promise). Defendant did not promise continued employment for any fixed term, but did offer payments for the express purpose of encouraging employees to remain.

Defendant's retention program by its terms created four unilateral contracts (one for each incentive period) which conditioned acceptance upon plaintiff's continued employment through the respective incentive period. Plaintiff remained employed by defendant through three of the incentive periods. According to the terms of the retention program, plaintiff was entitled to receive his accrued bonus money for these periods unless he was terminated for cause.[4]

Plaintiff alleges that defendant knowingly used an unfounded charge of sexual harassment to discharge him and evade its obligation to pay him the accrued bonus money. Defendant drafted the retention program statement. Defendant could have specified in the termination for cause provision that a determination of "cause" shall be at the sole discretion of the employer or for any reason so characterized by the employer. It did not do so. In the absence of any such qualification, the term "cause" signifies just or reasonable cause. See Banas v. Matthews Int'l Corp., 502 A.2d 637, 648 n.11 (Pa. Super. 1985) (reference to discharge for cause implies objectively just cause). See also Pyle v. Meritor Savings Bank, 1995 WL 695085,

[4]As plaintiff was employed at the close of the first three periods, the court assumes that he received the promised 33% of the incentive for those periods and is seeking the balance of 67%. Should plaintiff prevail on his Title VII claim, of course, he would be entitled to all such amounts he would have received had he not been unlawfully terminated.

*2 (E.D. Pa. Nov. 21, 1995) (termination "for cause" provision implies "reasonable" determination). If, as he alleged, plaintiff can prove that defendant knowingly discharged him without cause, he could qualify for the accrued incentive payments under the "due to no fault of their own" provision in the retention program statement. See id. at *3 (plaintiff who may not have wrongful discharge claim may still assert dismissal was pretextual to show he was not terminated "for cause").[5]

Consistent with the foregoing, defendant's motion will be granted in part and denied in part. Plaintiff may proceed with his Title VII and breach of contract claims. The other claims will be dismissed. An appropriate order will be entered.

[5]While this provision refers to reductions in force and relocation, the use of "such as" and "etc." suggests those references are not exclusive. Again, it is defendant which drafted the program statement.

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O R D E R

AND NOW, this day of February, 2001, upon consideration of defendant's Motion to Dismiss and plaintiff's response, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that defendant's Motion is **GRANTED** as to plaintiff's ERISA, intentional infliction of emotional distress, wrongful discharge and defamation claims, and the Motion is otherwise **DENIED.**

BY THE COURT:

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JAY C. WALDMAN, J.